Supreme Court, U.S.
FILED
AUG 9 - 2006
OFFICE OF THE CLERK

No. 05-1427

In the Supreme Court of the United States

DETROIT NEWSPAPER AGENCY, DBA DETROIT NEWSPAPERS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supported the National Labor Relations Board's finding that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging three economic strikers.

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OPINIONS BELOW

The per curiam judgment of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter*, but is *reprinted in* 171 Fed. Appx. 352. The decision and order of the National Labor Relations Board (Pet. App. 14a-359a) is reported at 342 N.L.R.B. No. 24. The Board's order granting reconsideration (Pet. App. 4a-13a) is reported at 343 N.L.R.B. No. 113.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2006. The petition for a writ of certiorari

was filed on May 5, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(1), makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 157, including the right to join and assist labor organizations. In *NLRB* v. *Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964), the Court held that an employer violates Section 8(a)(1) by discharging an employee when "it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct." Even if an employer has a good faith belief that strikers engaged in serious misconduct, discharge of those strikers is unlawful if the misconduct did not in fact occur. See *ibid.*

Under those principles, an employer violates the Act by discharging economic strikers for alleged serious strike misconduct which did not occur. In deciding whether economic strikers have engaged in serious misconduct for which they can be discharged, the National Labor Relations Board (Board) determines "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected by the Act." *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044, 1046 (1984) (quoting *NLRB* v. *W.C. McQuaide, Inc.*, 552 F.2d 519, 528 (3d Cir. 1977)), enforced, 765 F.2d 148 (9th Cir. 1985) (Table), cert. denied, 474 U.S. 1105 (1986).

2. a. Petitioner is a joint operating partnership of two newspapers, the Detroit News and the Detroit Free Press. Pet. App. 32a. Petitioner performs the newspapers' noneditorial functions, including printing, distribution, sale of advertising, and promotion. *Id.* at 34a. Petitioner's main office is located in the Detroit News building on West Lafayette Boulevard, in Detroit, Michigan. *Ibid.* Petitioner also operates several distribution centers throughout Detroit and suburban areas. *Ibid.*

After their collective-bargaining agreements expired in April 1995, six unions, representing various groups of employees, struck petitioner and the two newspapers in July 1995, and over 2000 employees went out on strike. Pet. App. 35a. On July 24, 1996, during the strike, the Board, pursuant to the terms of a settlement agreement with the striking unions, issued an order requiring the unions to cease and desist from, among other things, blocking or otherwise coercively interfering with ingress or egress at petitioner's places of business. *Id.* at 41a. As part of the settlement agreement, the unions consented to entry of a court order enforcing the terms of the settlement agreement. *NLRB* v. *Teamsters Local No. 372*, 95 F.3d 1153 (6th Cir. 1996) (Table), supplemented, 234 F.3d 1269 (6th Cir. 1998) (Table) and 209 F.3d 936 (6th Cir. 2000). Accordingly, the Board applied for, and the Sixth Circuit granted, enforcement of the Board's order. *Ibid.*

The strike ended over a year and a half after it began when, in February 1997, the unions made unconditional offers to return to work on behalf of the striking employees. Pet. App. 35a. During the strike, petitioner discharged many striking employees, including Douglas McPhail, Mike Youngmeier, and Gary Rusnell, claiming that they had engaged in strike misconduct. *Id.* at 2a,

31a-32a. The facts concerning the discharge of those three strikers are set forth below.

2. a. *Picketing at the Hayes Street Distribution Center.* On August 29, 1996, a group of 40 to 50 union officials and striking employees, including McPhail and Youngmeier, picketed at petitioner's Hayes Street Distribution Center in Roseville, Michigan. Pet. App. 251a. The picketers, some carrying picket signs, walked in a circle along the public access on Hayes Street in front of a wide driveway leading to petitioner's facility. Prior to the picketing, a union official instructed the strikers not to block any entrances to petitioner's property and reaffirmed for them the unions' goal of legal, peaceful picketing that day. *Id.* at 257a. Another union representative directed the strikers not to block the driveway and to keep moving in a circle. *Id.* at 256a.

Upon the picketers' arrival, petitioner immediately summoned the local Roseville police department to the Hayes facility. Pet. App. 254a, 257a-258a. About 20 police officers, including Deputy Chief Richard Heinz, quickly arrived at the Hayes facility. *Id.* at 257a-258a, 264a. Heinz, immediately taking charge of the scene, established traffic procedures to accommodate the separate interests of the picketers and petitioner. *Id.* at 256a-258a, 262a.

Heinz instructed the picketers, the unions, and petitioner that his officers would direct the traffic in and out of the facility by lining up vehicles in a turn-around lane and bringing them through the picket line in groups. Pet. App. 255a-258a, 262a-264a. After five or six vehicles had assembled, the officers informed the picketers that the waiting vehicles were about to enter. *Id.* at 258a. When the officers approached the picket line, the line opened, the picketers stood back, and the vehicles

entered the driveway in a group without incident. *Id.* at 257a-258a, 262a. Following those procedures, several groups of vehicles entered the Hayes facility during the picketing. *Id.* at 257a-264a. Similarly, if a vehicle wanted to exit, the police notified the picketers, who stepped aside and waited for the exiting vehicle to leave the property. *Id.* at 257a, 260a-262a.

Petitioner discharged 22 employees, including McPhail and Youngmeier, for participating in this picketing. Pet. App. 251a.[1] In identical letters dated September 18, 1996, petitioner stated that McPhail and Youngmeier had "physically blocked ingress and egress of traffic" to the Hayes facility. *Id.* at 251a-252a.

b. *Labor Day Rally at the Detroit News Building.* On Friday, August 30, 1996, many strikers, including Gary Rusnell, and their supporters participated in a Labor Day rally in front of the Detroit News building to bring public attention to the strike. Pet. App. 268a. The unions notified the police of the planned rally beforehand, and there was a large police presence throughout the three-hour rally. Petitioner openly videotaped most of the rally, during which several prominent national labor leaders, local union officials, political leaders, and dignitaries took turns speaking to an audience of up to 300. *Ibid.*[2] No violence, or threat of violence, occurred. *Id.* at 269a, 272a-274a.

The speakers used a microphone and podium situated on the stoop area in front of the doors leading to

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[1] Only the findings pertaining to the discharges of McPhail and Youngmeier were challenged before the Board. Pet. App. 17a.

[2] The list of speakers included AFL-CIO President John Sweeney, AFL-CIO Secretary-Treasurer Richard Trumpka, Congressman John Conyers, Bishop Thomas Gumbleton, and Detroit City Council Member Mary Ann Mahaffey. Pet. App. 268a.

the lobby of the Detroit News building. Pet. App. 268a. Those doors were accessible by the two front steps and two side ramps. *Ibid.* In the opening hour of the rally, the front doors were open and operational. *Id.* at 273a. One hour into the rally, police ordered petitioner to lock the front doors, following a procedure similar to that implemented at dozens of demonstrations at the building during the strike. *Ibid.* As directed, petitioner locked the front doors and barricaded them from the inside so that no one used them to enter or leave the building for the next two hours while the rally was in progress. *Ibid.* Petitioner did not object or claim that its business was being disrupted. *Id.* at 275a. Police officers directed people to use a side entrance to the building during the rally. *Id.* at 273a. That entrance remained open and available to the public throughout the entire rally. *Id.* at 275a-276a & n.110.

After two hours of speeches, the speakers sat down on the steps for an orchestrated photo-opportunity to publicize the strikers' cause. Pet. App. 268a-278a. Some strikers, including Rusnell, sat down on the steps and stoop, while other strikers remained standing nearby. *Id.* at 274a-275a. As pre-arranged by the rally organizers, the police stepped forward and arrested individuals who were sitting down. *Id.* at 274a-277a.

Petitioner discharged Rusnell and seven other strikers who sat down on the steps at the end of the rally. Pet. App. 269a-271a.[3] Petitioner's letter to Rusnell informed him that he was discharged for blocking ingress and egress to the front entrance of the Detroit News building. *Id.* at 269a.

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[3] Only the findings pertaining to the discharge of Rusnell were challenged before the Board. Pet. App. 17a.

3. Based on charges filed by the unions alleging unlawful discharges at those and other union events, the Board's General Counsel issued unfair labor practice complaints alleging that petitioner had unlawfully discharged 96 employees, including McPhail, Youngmeier, and Rusnell, because they had engaged in protected concerted activity. Pet. 5; Pet. App. 31a-32a. The parties settled many of the individual cases and the Board adjudicated the rest, ruling in petitioner's favor on some and against petitioner on others. *Id.* at 14a-369a.

The administrative law judge (ALJ) found that petitioner had unlawfully discharged McPhail, Youngmeier, and Rusnell. With respect to strikers McPhail and Youngmeier, the ALJ based his findings on a videotape of the picketing and the largely credited testimony of the senior police officer and union officials. The ALJ concluded that the picketers at the Hayes Street Distribution Center did not engage in serious misconduct that would justify their discharge. Pet. App. 258a. He found that petitioner called the police immediately after the picketers arrived and that there was no evidence that, prior to the arrival of the police, "there had been any violence or that [the pickets] had actually prevented anyone from entering or leaving." *Id.* at 259a.[4] The ALJ also found that, during the picketing, there was "no violence or threatening conduct by the pickets and * * * nothing that indicates that there was a likelihood

[4] Petitioner asserts (Pet. 6) that a large cement block in the driveway prevented entrance to the facility. The ALJ found, however, that there was no evidence that any of the discharged employees was responsible for that block, and that it was clear from the videotapes that the block did not affect the ability of vehicles to enter or leave the facility. Pet. App. 259a n.101.

of violence." *Id.* at 261a. Further, he observed that as a "practical matter, once the police arrived and took control of the scene, all parties were subject to their control and direction" (*id.* at 259a), and that when the police moved cars through the entrance, the pickets moved out of the way and vehicles exited without difficulty (*id.* at 262a).

The ALJ concluded that, while as a result of the procedures set up by the police some of those seeking to enter the facility may have been delayed in doing so, that fact did "not establish that the pickets blocked ingress or egress to the facility" or "convert peaceful and lawful picketing into serious misconduct." Pet. App. 259-260a. Rather, "throughout the picketing the pickets were engaged in the kind of 'peaceful patrolling' that is protected by the Act." *Id.* at 261a (citing *Clear Pine Mouldings*, 268 N.L.R.B. at 1047).

The ALJ also found that petitioner unlawfully discharged striker Rusnell for his conduct during the Labor Day rally. Pet. App. 278a. The ALJ observed that petitioner claimed that the discharges were for "blocking ingress and egress by sitting down on the steps and stoop" at the end of the rally and that it "did not discharge anyone for attending the rally" or demonstrating outside the building. *Id.* at 270a-271a, 277a. The ALJ, however, concluded that the strikers' actions in sitting down on the steps and stoop at the end of the rally did not constitute serious misconduct under *Clear Pine Mouldings*. *Id.* at 276a. The ALJ determined that the rally was intended to build support for the strikers rather than to block access to the building; that the police directed petitioner to lock its doors long before the sit-down at the end of the rally, and petitioner did not object; and that, as the rally ended, individuals briefly

sat in front of a door that had been locked for two hours and that the police had not let anyone use during that period. *Id.* at 276a-278a. The ALJ observed that, "[w]hatever disruption to [petitioner's] business that occurred that day had been going on without objection by [petitioner] for almost 2 hours before anyone sat down on the steps." *Id.* at 277a. The ALJ concluded that, in those circumstances, there was no evidence that any of the employees had prevented anyone from entering or leaving the building or that their sitdown could reasonably be said to have coerced or intimidated nonstriking employees. *Id.* at 278a.

4. The Board adopted the ALJ's findings that McPhail, Youngmeier, and Rusnell had not engaged in serious misconduct. Pet. App. 16a-18a. The Board held that the discharges violated Section 8(a)(1), under *NLRB* v. *Burnup & Sims*, *supra*, because the employees had not engaged in misconduct in the course of their protected strike activity.[5]

5. The court of appeals affirmed the Board's findings that McPhail, Youngmeier, and Rusnell had not engaged in misconduct, and enforced the Board's order requiring their reinstatement with backpay. Pet. App. 1a-3a. In a per curiam opinion, the court found that the "Board's findings are supported by the testimony of multiple witnesses, as well as by other direct evidence." *Id.* at 2a. The court further stated:

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[5] The Board found it unnecessary to decide whether the discharges also violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), which prohibits discrimination in regard to tenure of employment to encourage or discourage union support, and therefore did not adopt the judge's finding that the discharges also violated Section 8(a)(3). Pet. App. 17a n.5.

> Although [petitioner] argues the Board applied an incorrect legal standard under which it evaluated the success, not the coercive tendency, of the employees' activities and used police intervention to "excuse[]" employees' misconduct, the Administrative Law Judge's decision, which the Board adopted, properly identified and applied the test set forth in *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044 (1984). *See also Va. Holding Corp.*, 293 N.L.R.B. 182, 217 (1989) (employees' participation in picket disrupting traffic not "of itself particularly serious misconduct").

Ibid.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. This Court's review is therefore not warranted.

1. The court of appeals correctly held that the Board "properly identified and applied the test set forth in *Clear Pine Mouldings*" in finding that McPhail, Youngmeier, and Rusnell had not engaged in serious strike misconduct. Pet. App. 2a. Under *Clear Pine Mouldings*, in deciding whether a striker engaged in sufficiently serious strike misconduct to justify his discharge, the Board determines whether, "under the circumstances existing, [the misconduct] may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Clear Pine Mouldings*, 268 N.L.R.B. at 1046-1047 (quoting *W.C. McQuaide,*

Inc., 552 F.2d at 528).[6] That test applies, *inter alia*, when an employer claims to have discharged a striker for blocking access to its facility. See *F.E. Wray, Inc.*, 283 N.L.R.B. 771, 772 (1987) (parking truck across employer's driveway, thereby impeding access, not shown to constitute significant interference with employer's business); *CalMat Co.*, 326 N.L.R.B. 130, 135 (1998) (employer justified in discharging employee who, after all other pickets had moved aside, intentionally stood in front of truck that had been signaled to proceed through gate). See generally *Virginia Holding Corp.*, 293 N.L.R.B. 182, 217 (1989) ("Disruption of ingress and egress of vehicles is often associated with picketing and is the type of thing to be expected. When a strike occurs, there necessarily and commonly will be some disruptions. The question is whether the acts of disruption are so serious as to deny one continued employment.").

Petitioner argues (Pet. 10) that the Board's conclusion "was based in part on the finding that there was no evidence * * * that the blocking activities of striking employees actually prevented anyone from entering or leaving the Hayes and Detroit News facilities," and that the court of appeals and the Board therefore ignored well-established law that "striker misconduct should not be evaluated by its success." None of the cases on which petitioner relies (Pet. 10-12), however, holds that the Board is barred from considering the fact that no one was denied ingress or egress as a result of peaceful picketing when assessing whether, under all the relevant circumstances, the conduct had a reasonable tendency to coerce nonstrikers.

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[6] An analogous standard applies to coercion of persons who are not protected by the Act. *Clear Pine Mouldings*, 268 N.L.R.B. at 1046 n.14.

In *Newport News Shipbuilding & Dry Dock Co.* v. *NLRB*, 738 F.2d 1404 (1984), the Fourth Circuit did not address whether lack of success was relevant, but, rather, whether the striker's limited conduct—putting one nail on a driveway at a time when other nails were on the same ground—warranted the striker's discharge. The court found that the use of nails was a prevalent tactic throughout the strike and had caused serious problems for nonstriking employees reporting to work, and that the striker therefore was acting as part of a "premeditated effort to intimidate strike breakers." *Id.* at 1410-1411. Nor is this case like *NLRB* v. *United Mine Workers*, 429 F.2d 141 (3d Cir. 1970), which addressed circumstances in which 400-500 miners had formed a hostile crowd to prevent a rival union from meeting, and three miners had seized and struck the president of the rival union. In that context, the court observed that it need not be shown that pickets had achieved the intended result of preventing the rival union from meeting. *Id.* at 146. Similarly inapposite is *Pullman Inc.* v. *NLRB*, 407 F.2d 1006 (5th Cir. 1969), which did not involve picketing or blocking access, but instead addressed whether strikers who were present during a fight but who did not "actually thr[o]w a blow" had engaged in improper misconduct. *Id.* at 1018 n.7.

Nor is the Board's decision here inconsistent with the Board precedent that petitioner cites. Pet. 11. The conduct at issue in those cases plainly had a tendency to coerce the employees affected by it. See *Metal Polishers Int'l Union, Local No. 67*, 200 N.L.R.B. 335, 336 (1972) (union agents and picketers on several occasions actually prevented entrance by standing in front of cars of employees and employer managers); *Service Employees Int'l Union, Local 525*, 329 N.L.R.B. 638, 684-685

(1999) (on one day, pickets paraded in pairs across the entrance to a parking garage, purposely keeping many cars from entering, and then parked a vehicle across the entrance totally preventing access to the facility, and on another day, handcuffed themselves to the front doors of the building at lunchtime, "again impeding ingress and egress"), enforced, 52 Fed. Appx. 357 (9th Cir. 2002) (mem.). Neither the picketing at the Hayes facility nor the rally at the Detroit News building involved similarly confrontational conduct that itself had a tendency to coerce employees seeking access to the premises.[7]

2. Petitioner also contends (Pet. 13-14), with respect to the discharges of McPhail and Youngmeier, that the Board applied an incorrect legal standard by permitting police intervention to excuse striker misconduct at the Hayes Distribution Center. Petitioner's argument lacks merit and does not warrant review.

Petitioner bases its argument on two inapposite cases, *Newport News*, 738 F.2d at 1411-1412, and *Local 1150, United Electrical Workers*, 84 N.L.R.B. 972, 975 (1949). In both of those cases, the police intervened to

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[7] This case is also wholly dissimilar from *Local 1150, United Electrical Workers*, 84 N.L.R.B. 972, 975 (1949), see Pet. 12, where as many as 80 to 100 or more picketers patrolled in front of the plant so as to block the employees' main entrance, a door only 6 feet wide. The picketing was accompanied by assaults of a supervisor, in the presence of rank and file employees, and of a nonstriking employee as she left the plant, as well as threats of reprisal against a nonstriking employee and a supervisor. Petitioner also errs in relying (Pet. 10) on *Hughes* v. *Superior Court*, 339 U.S. 460, 466 (1950), where the Court observed that picketing may be unlawful if conducted "in numbers that of themselves carry a threat of violence." There is no claim that the picketing at the Hayes facility or the sit down at the end of the Labor Day rally were of that magnitude.

facilitate entry into the plant in the face of striker misconduct.

In *Newport News*, the discharged employee blocked a nonstriking employee, swore at him, and continually moved in front of him as he attempted to walk around the striker. The striker did not "voluntarily allow[] the nonstriker to pass," and only the intervention of a police officer permitted the nonstriker to enter the facility. 738 F.2d at 1410-1411. The Fourth Circuit concluded that such intentional obstruction demonstrated an "intent to intimidate or coerce," which was not negated by the police action. *Id.* at 1411.

In *Local 1150, United Electrical Workers*, the Board concluded that the manner of the picketing (which involved mass picketing in front of a narrow entrance), coupled with the existence of assaults and threats, "was calculated to bar and necessarily resulted in barring employees' ingress and egress at the plant." 84 N.L.R.B. at 975; see note 7, *supra*. In those circumstances, the Board concluded that the fact that police could have facilitated the entry of employees into the plant was not relevant because nonstrikers were not required to enlist the assistance of police to gain access to and from the plant. 84 N.L.R.B. at 975.

Here, by contrast, the picketers at the Hayes facility had not exhibited any misconduct before the police arrived. Pet. App. 259a, 262a-263a & nn. 104, 105. Petitioner, as a precaution, summoned the police immediately upon the picketers' arrival at the facility. Arriving within minutes of petitioner's call, the police implemented procedures for the orderly ingress and egress of the Hayes facility, and the picketers observed those pro-

cedures. *Id.* at 254a, 256a, 257a-259a.[8] Petitioner's argument effectively would require the Board and the court of appeals to speculate that, had the police not arrived when they did, the picketers would have engaged in misconduct. Nothing in either of the two decisions relied on by petitioner suggests that the Board and the court of appeals, based solely on such speculation, must condone the discharge of strikers for behavior they did not in fact exhibit.

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[8] There is no merit to petitioner's assertion (Pet. 6, 14) that comments by some picketers (such as "no scabs allowed" and "[k]eep going, scabby—we're closed") show that the picketing was intended to bar entrance to the facility. As the Board has observed, "peaceful picketing unquestionably includes the right to make nonthreatening appeals to those who are about to cross a picket line." *Tube Craft*, 287 N.L.R.B. 491, 493 (1987). Nor, contrary to petitioner's characterization (Pet. 14), did the pickets form a "tight, unyielding formation." As the Board found, picketers were "at all times involved in peaceful patrolling," and at police direction they moved to allow vehicles to pass. Pet App. 262a-264a. There is no merit to petitioner's further claim (Pet. 14 n.3) that it discharged picketers at the Hayes facility because the picketing violated the Sixth Circuit's August 16, 1996, order. Not only is that assertion based on petitioner's mischaracterization of the picketing, but, as the Board observed, the issue of whether the picketing violated that order was never presented to the Sixth Circuit. Pet. App. 41a-42a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2006